Copper State Rubber of Arizona, Inc. *and* United Automobile, Aerospace and Agricultural Implement Workers of America, District 65, AFL–CIO. Cases 28–CA–10014, 28–CA–10066, 28–CA–10133, 28–CA–10212, 28–CA–10251, and 28–CA–10374

January 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On August 21, 1990, a hearing in the above-entitled proceeding opened before Administrative Law Judge James M. Kennedy of the National Labor Relations Board. At various times prior to and after the opening of the hearing, counsel for the General Counsel submitted a comprehensive informal settlement proposal to Respondent for its consideration. During the course of settlement discussions, the Respondent moved the judge to accept an offer it had prepared. This offer related to all the allegations of the complaint except those concerning employee Wilfrido Miranda. The General Counsel and the Charging Party refused to accept the offer and asked the judge to reject it.

After considering objections filed by the General Counsel and the Charging Party, but prior to taking any evidence, the judge found that acceptance of the Respondent's offer would fully effectuate the policies of the Act. On September 14, 1990, Judge Kennedy issued a Notice of Approval of Partial Informal Settlement Agreement. In essence, Judge Kennedy thereby accepted Respondent's offer. The accepted offer provides for, inter alia, backpay in the amount of $5000 to discriminatee Tom Dotson, contingent on his execution of a waiver and release clause, a minimal amount of backpay to two other discriminatees, and the payment of a Christmas bonus and two safety bonuses to all three discriminatees. The offer further states that it ''is intended to settle all allegations in the consolidated complaint . . . except those allegations pertaining to the alleged discriminatory discipline and discharge of Wilfrido Miranda.''

On September 25, 1990, the General Counsel filed a request for special permission to appeal the judge's ruling.[1] He contended, inter alia, that the purported settlement is not a settlement; that the judge lacks authority to approve it; that the settlement should be rejected because it does not include a reservations clause providing that the General Counsel can use evidence underlying the settled allegations in the litigation of the nonsettled allegations; that the waiver and release agreement is contrary to Board policy; and that the purported settlement approved by the judge was far more favorable to the Respondent than any settlement previously offered by the Regional Director, thereby tending to undermine the Regional Director's authority to negotiate settlements.

Having duly considered the matter, and for the reasons that follow, the Board has decided to grant the appeals of the General Counsel and the Charging Party and to revoke the judge's Notice of Approval of the Partial Informal Settlement.

First we note that the General Counsel and the Charging Party have not agreed to Respondent's offer of settlement. The Board has held that the opposition of the General Counsel and the Charging Party is a significant factor to be considered in determining whether a non-Board settlement is to be accepted.[2] We do not believe that some lesser standard should govern a proffered adjustment made by a respondent to an administrative law judge. Accordingly, the fact that the General Counsel and the Charging Party oppose the proffered adjustment involved here militates against acceptance of it.[3]

Second, the Respondent's offer does not address all the allegations of the complaint. We recognize that, contrary to the General Counsel's contention, the evidence underlying the settled allegations can be used as background evidence to support the allegations to be litigated.[4] However, because of that very fact, acceptance of the proffered adjustment in the instant case would not necessarily save the parties from the time and expense of extensive litigation.

Third, we note that the adjustment does not provide for the entry of a Board order. Hence, it provides no protection against future misconduct.

Finally, the adjustment contains release and waiver language with respect to Dotson that is extremely broad. For example, the clause can be read to forbid the employee from filing charges with respect to future unrelated matters. In addition, Dotson signed it without counsel. In these circumstances, the release and waiver language militates against acceptance of the proffered adjustment.[5]

[1] On October 9, 1990, the Respondent filed a statement in opposition to the General Counsel's appeal. On October 15, 1990, the Charging Party filed its own appeal, which supports the General Counsel's appeal.

[2] See *Independent Stave Co.*, 287 NLRB 740 (1987).

[3] We do not necessarily suggest that the Board would never accept a respondent's proffered adjustment over the objections of the General Counsel and Charging Party. If the Board concludes that a proffered adjustment covers all the allegations of the complaint and effectuates the remedial purposes of the Act, the Board may well accept the adjustment, even over the objections of the General Counsel and the Charging Party. However, we do not pass on that issue.

[4] *Northern California District Council of Hodcarriers (Joseph's Landscaping Service)*, 154 NLRB 1384 (1965).

[5] Again, we are not suggesting that a release and waiver clause can never appear in a settlement or adjustment. Rather, we simply conclude that the breadth of the release and waiver clause in this case, together with the fact that the employee was without counsel, are factors militating against acceptance of the proffered adjustment.

ORDER

IT IS ORDERED that the appeals are granted, approval of the settlement is revoked, and this matter is remanded to the administrative law judge for further appropriate action.